No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

VS.

RADCLIFFE MATERIALS, INC., et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE BOISE CASCADE CORPORATION IN SUPPORT OF RESPONDENTS

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3. Other Authorities

Easterbrook, Landes & Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J.L. & Econ. 331 (1980) 17

Hufstedler & Nyelski, ABA Action Commission Challenges Litigation Cost and Delay, 66 A.B.A.J. 965 (1980) 12

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BRIEF OF AMICUS CURIAE BOISE CASCADE CORPORATION IN SUPPORT OF RESPONDENTS

Boise Cascade Corporation ("Boise") submits this brief pursuant to Supreme Court Rule 36.2 as *amicus curiae* in support of respondents. Boise respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit to deny contribution in antitrust cases should be affirmed.

INTEREST OF AMICUS CURIAE

Boise is one of thirty-eight defendants named in most of the more than sixty antitrust cases consolidated as *In re Corrugated Container Antitrust Litigation* ("MDL-310") in the United States District Court for the Southern District of Texas, Houston Division. The facts concerning this litigation are set forth in the Brief Of Amicus Curiae

Owens-Illinois, Inc. And Certain Other Defendants In The Corrugated Container Litigation, dated January 16, 1981. Boise, like the other MDL-310 *amici,* has a substantial interest in this litigation because of the probability that The Mead Corporation and other defendants in MDL-310 will continue to assert contribution claims against Boise and their other co-defendants unless this Court rejects contribution claims in antitrust cases. Boise was accepted as an *amicus curiae* on respondents' side in the Fifth Circuit and has obtained the parties' written approval for the filing of this brief in accordance with Rule 36.2.

SUMMARY OF ARGUMENT

I.

Despite the rejection of contribution claims in at least seventeen federal appellate and district court antitrust cases since 1969, petitioner requests this Court to create a new cause of action for contribution in all antitrust cases. However, contribution is not supported by either the statutory language or legislative history of the antitrust laws. Moreover, contribution would have complex social, economic and competitive effects. Review of contribution by this Court in light of these factors would be contrary to substantial precedent, and is unsupported by this Court's common law cases. This Court should therefore defer to Congress on the question of whether contribution should be created for antitrust cases.

II.

Even if this Court finds it should not defer to Congress, the Fifth Circuit's ruling against petitioner's claims should be affirmed because contribution is undesirable and unnecessary in antitrust cases.

Contribution would have serious adverse effects on antitrust litigation and the judiciary. It would often substantially complicate or change antitrust cases through, among others, the addition of parties by defendants, the probability of multiple trials regarding the same controversy and the deterioration of joint defense coordination. These problems would impose unacceptable burdens on antitrust courts and litigants.

Fairness would not be served by permitting contribution in this and other antitrust cases. The complexities injected into antitrust suits and the potential addition of innocent parties would not be fair to either plaintiffs or defendants. Moreover, fairness considerations in antitrust cases necessarily differ from those in the negligent tort actions in which contribution has typically been permitted.

The concerns expressed by petitioner and *amici* regarding coercion resulting from judicially created joint and several liability in antitrust litigation can and are being handled through more effective utilization of existing procedural devices, such as refusal to certify coercive class actions under Rule 23. The courts also can diminish or eliminate the coercive impact of joint and several liability through other means, including claim reduction or the actual abolishment of joint and several liability in some or all cases. Courts should remain free to exercise their power to adopt these remedies since they would not have the panoply of adverse effects which a new cause of action for contribution would have on antitrust courts and litigants.

For each of these reasons, a new cause of action for contribution should not be created for antitrust cases.

III.

Permitting contribution claims against settling defendants in antitrust cases would frustrate the strong judicial

policy favoring settlement. If contribution were allowed against them, settling defendants would be forced to shoulder once again the same litigation expenses and exposure which they faced in the settled cases. No defendant would settle under such circumstances. For this reason, even those courts and statutes which have recently created contribution rights have explicitly precluded contribution claims against settling defendants. If a new cause of action for contribution were established for antitrust cases, no such claims should be permitted against settling defendants.

ARGUMENT

The text and legislative history of the antitrust laws provide no support for petitioner's contribution claims. Since the Sherman Antitrust Act was passed in 1890, Congress has repeatedly passed new antitrust laws, or amended the existing antitrust statutes, without mentioning contribution. The first consideration of contribution under the antitrust laws by any Congressional body occurred in July 1979. At that time a bill permitting contribution in price-fixing cases was approved by the Senate Judiciary Committee. S.Rep. No. 428 (S. 1468), 96th Cong., 1st Sess. (1979). There has been no action on the bill since it was reported out to the Senate.

At least seventeen courts have denied contribution claims in antitrust cases since 1969.[1] In 1979 a divided Eighth

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[1] Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. ¶ 61,698 (D. Utah), aff'd, 1979-2 Trade Cas. ¶ 62,995, en banc rehng. granted (10th Cir., Dec. 27, 1979); In re Beef Industry Antitrust Litigation, M.D.L. No. 248 (N.D. Tex. Sept. 1, 1978), aff'd, 1980-1 Trade Cas. ¶ 63,021, en banc rehng. denied (5th Cir. Dec. 21, 1979), pet. for cert. pending sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, No. 79-1214 (filed Feb. 6, 1980); In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979), aff'd per curiam, No. 79-2439 (5th Cir. 1979), cert. dismissed, 101 S.Ct. 311 (No. 79-972; 1980); Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., No. 75-2820 (E.D. La. 1977), aff'd, 604 F.2d 897, en banc rehng. denied, 608 F.2d 524 (5th Cir. 1979), cert. granted sub nom. Texas Industries, Inc. v. Radcliffe Materials, Inc., 101 S.Ct. 351 (No. 79-1144; 1980); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., Civil No. 4-77-110 (D. Minn. Jan. 26, 1978), rev'd in part, 594 F.2d 1179 (8th Cir. 1979), en banc rehng. denied (8th Cir. April 17, 1979); Newark Motor Inn Corp. v. Fleck, 1980-2 Trade Cas. ¶ 63,465 (D. N.J. 1980); In re Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979); Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. June 22, 1979), appeal docketed, No. 79-2667 (5th Cir. July 26, 1979); Hedges Enter-

Circuit panel became the first and only court to hold that "the right of contribution [should] exist [in antitrust cases] . . . at least under certain circumstances." *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979) ("*Beauty Supply*"). Since the Eighth Circuit's decision, two appellate and at least five district courts have rejected even *Beauty Supply's* limited holding. *See* note 1, *supra*.[2]

Contribution claims are therefore unsupported by the text and legislative history of the antitrust laws and by the overwhelming weight of federal antitrust precedent.

I. THE PROPRIETY OF CONTRIBUTION IN ANTITRUST CASES SHOULD BE CONSIDERED BY CONGRESS, NOT THE COURTS

The threshhold question in this case is whether, in the absence of any congressional support, this Court should create a cause of action for contribution in statutory cases. Contrary to petitioner's position, this Court's cases demonstrate that deference to Congress on this issue is appropriate in all statutory cases, and particularly in those brought under the antitrust laws. Substantial policy considerations also fully justify deference to Congress on the contribution issue.

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prises v. Continental Group, Inc., 1979-1 Trade Cas. ¶ 62,717 (E.D. Pa. 1979); In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979); El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976); Labbee v. Wm. Wrigley & Co., No. 4019 (W.D. Wash. Dec. 20, 1974); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F.Supp. 1339 (S.D.N.Y. 1969).

[2] *Beauty Supply* has been interpreted to permit claims only against nondefendants and expressly to exclude settling defendants. See Alabama v. Blue Bird Body Co., supra, at 3-5; In re Fine Paper Antitrust Litigation, supra, at 3; In re Ampicillin Antitrust Litigation, supra, at 650.

A. The Creation Of Contribution Rights In Antitrust Cases Is Not Supported By This Court's Precedent.

Petitioner relies upon three categories of cases to support its view that this Court should create a cause of action for contribution in antitrust cases. Far from supporting petitioner's claims, these cases demonstrate that a decision by this Court to create a cause of action for contribution would be unprecedented.

The first group of cases is exemplified by *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972). Brief for Petitioner Texas Industries, Inc. ("Petitioner Br.") at 8. In that case this Court reaffirmed the existence of a nuisance action under federal common law. In contrast to the antitrust laws, no statute had aligned the rights of any of the litigants.

In the second group, the case creating federal common law deals with a statute which provides that federal jurisdiction exists over certain controversies involving specified parties, but does not establish the substantive law to be applied in such cases. *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957), cited by petitioner at p. 8 of its brief, is an example of a case dealing with such a statute. Unlike the labor statute considered in *Lincoln Mills,* the antitrust laws do not merely provide federal courts with a jurisdictional grant over cases between specified parties.

The last group of cases cited by petitioner includes those in which this Court necessarily must create procedures or delineate the scope of the substantive causes of action created by the antitrust laws in order for them to function. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 342-48 (1971), for example, involved the question of

the effect of a release on a plaintiff's claims against other alleged coconspirators. Petitioner Br. at 10. Other cases cited by petitioner deal with the scope of the causes of action created by Congress for antitrust plaintiffs, resolution of which is particularly necessary because the courts have the duty of fixing the standard for each violation. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 137-40 (1968); *United States* v. *Associated Press*, 52 F.Supp. 362, 370 (S.D. N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

These cases provide no support for judicially creating a cause of action for contribution in statutory cases. However, this Court's cases fully support deference to Congress on the issue of contribution in antitrust and other statutory cases. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240, 271 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972); *United States* v. *Gilman*, 347 U.S. 507 (1954); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952). The Fifth Circuit in this case and the Tenth Circuit have recognized that Congress is the more appropriate forum for the resolution of this issue. *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897, 906, *en banc rehng. denied*, 608 F.2d 524 (5th Cir. 1979), *cert. granted sub nom. Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 101 S.Ct. 351 (No. 79-1144; 1980) (*"Abraham Construction"*); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995 at 79,704 (10th Cir. 1979), *en banc rehng. granted* (10th Cir. Dec. 27, 1979).

B. Congress Is The Best Forum For Reviewing The Propriety Of Contribution Under The Antitrust Laws.

There are substantial reasons for deferring to Congress on the issue of contribution in each statutory area.

In the absence of judicial deference, inconsistency in results would be almost a certainty in each statutory cause of action until this Court has resolved each substantive and procedural issue. Courts could differ in their opinions as to whether such claims should be created under each statute, as has happened in two of the three statutory areas in which this issue is presently under review in this Court.[3] The procedural and substantive parameters[4] of any cause of action created then would be subject to further debate and inconsistency. Resolution of the merits of contribution and its many differe[illegible]forms in each statutory area through

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[3] *Antitrust:* Compare Beauty Supply, supra, with the Fifth Circuit's opinion herein, and Olson Farms, supra. *Title VII:* Compare Younger v. Glamorgau Pipe & Foundry Co., 418 F.Supp. 743 (W.D. Va. 1976), vacated on other grounds, 561 F.2d 563 (4th Cir. 1977), with Glus v. G. C. Murphy, 629 F.2d 248 (3d Cir. 1980). *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 445 U.S. 902 (1980), is consistent with other cases which have uniformly rejected contribution claims under the Equal Pay Act.

[4] Questions relating to the scope of the cause of action, venue and limitations of actions are examples of the issues which would pose considerable and varying problems if contribution rights were judicially created for statutory cases. For example, a very short limitations period for contribution claims may be entirely appropriate in antitrust cases because the facts from which antitrust claims arise are more complex than those required to prove other types of actions, and the information and facts may therefore be more easily lost over time to the contribution action defendant's detriment.

judicial analysis of the facts and arguments in many separate cases would involve tremendous expenditures of time and effort by the courts, risk continual inconsistency in application and results, and impose constant uncertainty on litigants and courts. However, resolution of even foreseeable substantive and procedural issues through the facts and arguments of one case in each statutory area, without thorough investigation, examination and study of their impact on the important social, economic and competitive considerations involved in creating contribution claims in each factual context, would place courts in the position of creating a rule which could have unforeseen results in other cases. *See United States* v. *Gilman,* 347 U.S. 507, 510 (1954).

A broad and empirical study of the relative strengths and weaknesses of contribution and its many possible forms in each type of statutory case is possible only if review is undertaken in a Congressional setting. Such legislative balancing is particularly necessary insofar as the antitrust laws are concerned. The numerous effects which contribution would have on each type of antitrust case and factual setting could not be fully analyzed in the context of any single case. Antitrust courts, the parties in this case and other defendants, legislators and commentators have focused upon differing effects and considerations in analyzing the propriety of contribution. Moreover, in light of these considerations, contribution advocates in this case and elsewhere have supported different procedural and substantive forms of contribution.[5]

Unlike the courts, Congress could examine at one time these many views on the important economic and social

[5] See, e.g., S. Rep. No. 428 (S. 1468), 96th Cong., 1st Sess. (1979); Resolutions and Reports of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution In Damage Actions Brought Thereunder (Sept. 6, 1979); *Beauty Supply,* 594 F.2d at 1186.

policy considerations involved in each possible form of contribution in every antitrust context.[6] As this Court has recognized, decisions on issues which would affect competition and deterrence are more appropriately addressed by Congress than by the courts. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972).

As the discussion above demonstrates, contribution should not be recognized in any antitrust case in the absence of a Congressional directive to do so.

II. CONTRIBUTION IN ANTITRUST CASES WOULD BE UNDESIRABLE AND UNNECESSARY

Contribution would have numerous adverse effects upon antitrust litigation. Moreover, contribution in antitrust litigation would be inequitable, is not supported by contribution precedent, and is not necessary to ameliorate or resolve petitioner's concerns. For each of these reasons, petitioner's contribution claims should be rejected.

A. Contribution Would Have Substantial Adverse Effects On Antitrust Litigation.

Both appellate and district courts have rejected contribution claims in antitrust cases because of their adverse effects

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[6] Such reasons for deference were recently reiterated in *Diamond* v. *Chakrabarty*, 100 S.Ct. 2204, 2212 (1980), where an interpretation of a statute was rejected with the observation that:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the government, the Congress and the Executive, and not to the court.

on antitrust litigants and courts, including the frustration of settlements[7] and the other prohibitive burdens contribution would impose on the judicial administration of antitrust cases. In light of these problems, creation of contribution rights for petitioner would be wholly inappropriate.

1. Contribution Would Impose Unacceptable Burdens On Antitrust Courts And Litigants.

The present burden of antitrust cases on the judiciary is a matter of such broad concern that Congress has recently passed legislation for the express purpose, among others, of expediting antitrust litigation.[8] The legal profession has also expressed its concerns over the burdens imposed on both courts and litigants by large complex cases.[9] Contribution would subject the already overworked federal court system to unacceptable burdens, to the considerable detriment of all concerned and in direct contradiction to these concerns. These burdens, which would render antitrust cases "virtually impossible to manage",[10] are sufficient in themselves to reject petitioner's claims.

The burdens on the judiciary in simply determining the propriety of contribution for each type of antitrust violation, and formulating the procedural and substantive

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[7] See Brief of Amicus Curiae Owens-Illinois, Inc. And Certain Other Defendants In The Corrugated Container Litigation.

[8] Antitrust Procedural Improvements Act of 1980, S. 390, 96th Cong., 2d Sess. (1980).

[9] In 1978, for example, the Board of Governors of the American Bar Association approved the creation of the Action Commission to Reduce Court Costs and Delay, which recently made public its first progress report. Hufstedler & Nyelski, ABA Action Commission Challenges Litigation Cost and Delay, 66 A.B.A.J. 965 (1980).

[10] In re Corrugated Container Antitrust Litigation, supra, 84 F.R.D. at 41.

aspects of any contribution cause of action created, would be considerable. Thereafter, courts and litigants would be constantly burdened with "the processing of the many possible cross-claims and impleader actions" and the hinderance or elimination of "joint defense efforts with their savings in court, staff and attorney time." *In re Corrugated Container Antitrust Litigation, supra,* 84 F.R.D. at 41. There is also substantial "potential for confusion, delay and complexity inherent in permitting antitrust defendants a right to implead other alleged antitrust violators who may distort the litigation . . .." *Beauty Supply, supra,* 594 F.2d at 1190 (dissenting opinion).

The considerable burdens, complications and distortions caused by contribution claims can be easily ascertained from a review of their impact in a case such as MDL-310. Cross-claims would be filed by some or all defendants against all other defendants. The contribution complaints need not name the same defendants as those named in the MDL-310 complaints, nor would they necessarily make the same conspiracy allegations;[11] in fact, each contribution complaint could name as third-party defendants some or all of the more than one thousand present and former corporate competitors of the defendants.[12] Individuals could also be named, adding substantially to the number of cross-claims and third-party claims. The allegations and cross-defendants in, and substantive scope of, each defendant's cross-complaint could also differ.

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[11] Additional claims or allegations could be made over and beyond those in the MDL-310 complaints as long as the claims would reasonably fit within plaintiffs' complaint. See, e.g., Getter v. R. G. Dickinson & Co., 366 F.Supp. 559, 569 (S.D. Iowa 1973).

[12] Indeed, one contribution claimant in MDL-310 specifically reserved its right to do so. An additional complication present in MDL-310 is that many of these potential third party defendants are already members of the plaintiff class.

The manageability problems of the additional contribution pleadings, claims, discovery requests and parties in antitrust cases merely during pretrial proceedings could become overwhelming if contribution were permitted. As one district court has noted, these complications present the "potential for reordering the entire structure of antitrust litigation." *Newark Motor Inn Corp.* v. *Fleck*, 1980-2 Trade Cas. ¶ 63,465 at 76,457 (D.N.J. 1980). *See also Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897, 906 (5th Cir. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 at 72,112 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969). The uncertain scope of the litigation caused by differing contribution claims would add to the confused state of such litigation. Moreover, while coordination of defendants is a well-recognized necessity in complex litigation,[13] the existence of contribution claims would virtually eliminate coordinated joint defense efforts.

The absence of cooperation would prolong discovery and cause continuing problems at trial. Moreover, parties forced to trial by reason of contribution claims will also prolong the trial itself.[14]

Of course, contribution claims need not be asserted in or tried with a plaintiff's action. *See, e.g.*, 1955 Uniform Con-

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[13] Coordination of defendants is a policy strongly encouraged by the Manual for Complex Litigation and was imposed in MDL-310 by court order. See Manual at § 1.93.

[14] If the cross-complaint named only the original defendants in the MDL-310 complaints, the trial of the class action cases would have been extended by at least three years if each of the thirty-seven contribution defendants took no longer to present its defense than the four weeks taken by the one defendant which tried the case to a verdict.

tribution Among Joint Tortfeasor Act, § 3(a), 12 U.L.A. at 88 (1975). If the plaintiffs were successful at trial, courts therefore could be confronted with the possibility of one or more cases brought by contribution claimants involving substantial pretrial discovery and trials of similar or longer duration than those in the original action. *See Newark Motor Inn Corp.* v. *Fleck,* 1980-2 Trade Cas. ¶ 63,465 at 76,458 (D. N.J. 1980).

In *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), this Court held that indirect purchasers did not have a cause of action under § 4 of the Clayton Act in part because of complications in proof which would result from attempting to divide damages between direct and indirect purchasers. According to the Court, one reason indirect purchasers had to be denied a cause of action was because of "the costs to the judicial system and the efficient enforcement of the antitrust laws" imposed by the "complexities and uncertainties" raised by their claims. 431 U.S. at 732 and 740-45. Just as in indirect purchaser actions, permitting contribution in antitrust cases "would transform treble-damages actions into massive multiparty litigations" (431 U.S. at 740), a change which should not be permitted unless Congress decides that the new cause of action is warranted (431 U.S. at 734 n.14 and 746). The complications of contribution, just like those involved in indirect purchaser suits, would be likely substantially to decrease the filing of private antitrust lawsuits.[15] As this Court held in *Illinois Brick*:

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[15] Unlike the indirect purchaser burdens and complications of proof analyzed in *Illinois Brick,* the burdens on the plaintiff in any antitrust case could continue even after its case was over: if contribution claims were severed or brought after judgment, a plaintiff's presence often could be required during pretrial discovery and trial in order for the contribution plaintiff to prove the contribution defendant's liability to plaintiff on the underlying claims. Cf. Troutman v. Modlin, 353 F.2d 382, 386-87 (8th Cir. 1965); Walker v. Patterson, 325 F.Supp. 1024, 1026 (D. Del. 1971); Rowe

> The Court's concern in *Hanover Shoe* [was] to avoid weighing down treble-damages actions with the 'massive evidence and complicated theories,' 392 U.S. at 493. . . . We are no more inclined than we were in *Hanover Shoe* to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws. (431 U.S. at 741.)

As the above discussion illustrates, the costs and inefficiencies which would be imposed on the federal court system and litigants by contribution claims in antitrust cases would be overwhelming.

2. Contribution Would Not Promote Deterrence.

Petitioner argues and *Beauty Supply* found that greater deterrence of antitrust law violations would occur if a potential violator knew that it would be joined in antitrust cases through contribution claims if an antitrust suit were filed. Petitioner Br. at 17; *Beauty Supply,* 594 F.2d at 1185.[16]

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v. John C. Motter Printing Press Co., 273 F.Supp. 363, 365 (D.R.I. 1967). Contribution claimants would often need to develop substantial evidence and testimony from plaintiffs during discovery and trial of their contribution claims.

[16] An underlying factual assumption of petitioner's argument is that coconspirators which were not named in a plaintiff's complaint would be forced into antitrust cases as third-party defendants if contribution were allowed, thereby forcing disgorgement of "ill-gotten gains." Several factors undermine the validity of this assumption. First, there is no guarantee that defendants would not join innocent third-party defendants in their contribution complaints. Second, the addition of other parties does not mean that "ill-gotten gains" will be obtained even if an alleged coconspirator is joined. In the instant case, the respondents could have obtained no "ill-gotten gains" from plaintiff, even if the conspiracy were properly found to exist, because they made no sales to the plaintiff. Third, it is the rare exception that a plaintiff chooses to forego suit against a large number or all of the corporations which it feels participated in the conspiracy alleged in its complaint.

There is no empirical evidence or economic proof that the uncertain prospect of being excluded from a plaintiff's suit encourages anticompetitive behavior. While *Beauty Supply's* majority recognized the deterrence question cuts both ways, its ultimate conclusion that deterrence would be increased was made independent of any economic analysis. 594 F.2d at 1185. No other court has agreed with its conclusion. *See, e.g., Abraham Construction, supra,* 604 F.2d at 901; *Alabama* v. *Blue Bird Body Co., supra,* at 5; *El Camino Glass* v. *Sunglo Glass Co.,* 1977-1 Trade Cas. ¶ 61,533 at 72,112; *Newark Motor Inn Corp.* v. *Fleck, supra,* 1980-2 Trade Cas. ¶ 63,465 at 76,457. In fact, *Beauty Supply's* conclusion that contribution strengthens deterrence is inconsistent with the views of the authors of the only comprehensive economic analysis of contribution in antitrust cases. These economists and lawyers concluded that contribution is inadvisable from a cost-benefit analysis in part because the probability of inclusion in a suit through contribution would not increase deterrence. Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,* 23 J.L. & Econ. 331, 349-50 (1980).

Far from the purported effects discussed by petitioner, contribution's complications would discourage private antitrust suits, thereby reducing deterrent effect of the antitrust laws.

B. Contribution Would Not Promote Fairness In This And Other Antitrust Cases.

Beauty Supply stated that "the deciding factor in [its] decision [was] fairness between the parties." 594 F.2d at 1185. However, *Beauty Supply's* conclusion to permit contribution is not supported by such fairness considerations in this and other antitrust cases.

Fairness considerations between the parties are generally not the same in antitrust cases as they are in the types of common law litigation for which contribution has typically been created. In the ship and airplane cases cited by petitioner,[17] the potential parties are usually fewer and always known, the proof is much less substantial, and there is no strong equity against imposition of additional claims among the few tortfeasors in the case. However, contribution would inject substantial complications into antitrust litigation which would be exceedingly unfair to plaintiffs and defendants,[18] could result in the impleading of innocent parties, and would impose heavy burdens upon the courts and parties not experienced in such actions.

Where contribution has been created, it has been permitted typically only in common law tort cases alleging negligent conduct. Fairness considerations in such cases differ dramatically from those in a typical Sherman Act,

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[17] Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974); United States v. Reliable Transfer Co., 421 U.S. 397 (1975) Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975). Petitioners have also cited a securities case in support of their contribution claims. Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979). However, this case dealt with contribution under a statute which expressly permits contribution claims under its private right of action sections.

[18] The problems generated for joint defense activities could decrease defendants' overall effectiveness in opposing coercive but baseless claims, precisely the opposite effect sought by petitioner. Moreover, the added evidentiary complexities would frequently increase the expense of discovery and trial for all parties. These added expenses could even force innocent but smaller defendants to forego the litigation through settlement of plaintiff's claims, if settlement ended liability for contribution.

§ 1 case. In such conspiracy cases, the complaints allege intentional actions: there is "no such thing as an 'unwitting conspirator'." *United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963). Not only do the social policy considerations in granting contribution to intentional tortfeasors call for its denial in the absence of a statutory directive,[19] most statutes and most of the cases cited by petitioner permit only unintentional tortfeasors to sue for contribution.[20] Petitioner's contribution claim is therefore not supported by any trend toward granting contribution in cases such as this at the state or federal level.

Finally, even the fairness considerations advanced by contribution claimants often do not exist from a factual standpoint. In this case, for example, only petitioner made sales to the plaintiff. Nonetheless, petitioner claims it would be fair to force respondents to share in a judgment which would cover any overcharges which it alone has obtained. Such a result would certainly not be equitable or fair.

For all of the above reasons, *Beauty Supply's* fairness considerations do not apply in this or other complex antitrust cases.

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[19] As Mr. Justice Brennan noted while serving on the New Jersey Supreme Court: "These judicially created common-law and equitable principles [against contribution among intentional tortfeasors] are, of course, vulnerable to extinction or modification at the hands of the Legislature, the ultimate arbiter of public policy." Judson v. Peoples Bank & Trust Co. of Westfield, 110 A.2d 24, 34 (N.J. 1954).

[20] See, e.g., Restatement (2d) Torts § 886A(3) (1977). Thirty-four of the forty-seven states' contribution statutes permit contribution only by negligent tortfeasors.

C. Appropriate Remedies Are Available To Ameliorate Coercion In Antitrust Cases.

Amelioration of the coercive nature of joint and several liability is the objective of petitioner and certain of the MDL-310 *amici*.[21] *See* Petitioner Br. at 12; Brief of Westvaco Corporation as Amicus Curiae ("Westvaco Br.") at 9-12; Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae ("G-P Br.") at 6-14; Brief of Weyerhaeuser Company and Willamette Industries, Inc. as Amici Curiae ("Weyerhaeuser Br.") at 4-6. The discussion above emphasizes that contribution is a procedural and substantive nightmare which would be detrimental to all involved in antitrust litigation. However, appropriate remedies do exist to combat such coercion in antitrust cases.

If this Court is inclined to eliminate coercion caused by joint and several liability, it should do so by abolishing joint and several liability, not through contribution.[22] Nothing in § 4 of the Clayton Act suggests that joint and several liability in antitrust cases is appropriate. The courts which first determined that joint and several liability should apply simply adopted the concept from the common law, without consideration of the implications of the rule in an antitrust context. *See, e.g., City of Atlanta* v. *Chattanooga Foundry & Pipeworks,* 127 F. 23 (6th Cir. 1903), *aff'd,*

[21] Petitioner's contribution claim would effectively eliminate the impact of joint and several liability because all conspirators would be liable only for their contributive shares.

[22] Such an approach has been advocated by a former Chairman of the American Bar Association's Section of Antitrust Law. See Izard & Miller, "High Price-Fixing Awards Require Abolition of Joint, Several Liability," 1 Nat. L.J. at 22-23 (Aug. 27, 1979). Some courts are presently confronting similar issues. Cf. Mid-West Paper Products Co. v. The Continental Group, Inc., 596 F.2d 573, 583-87 (3d Cir. 1979).

203 U.S. 390 (1906). When the possible rationales for the rule are examined under modern-day circumstances, the need for joint and several liability diminishes substantially.[23]

Abolishing joint and several liability outright would not have the same adverse effects as contribution. While permitting contribution against settling defendants would usually make settlement of antitrust cases impossible, in the absence of joint and several liability defendants could freely negotiate their final peace. The absence of joint and several liability would also permit plaintiffs to retain control over their cases, being able to choose the defendants to be joined in their cases and the precise nature of their claims. The potential changes in the geographic and substantive scope of their claims, which contribution could inject into the plaintiff's case, would not occur if joint and several liability were abolished. Moreover, those not sued by plaintiffs would be spared unnecessary and unfair burdens and expense imposed by a defendant's contribution claims. And, unlike contribution, the abolishment of joint and several liability would not adversely affect joint defense efforts.

Courts certainly should be left free to provide for court-ordered diminution of the coercive impact of joint and several liability on a case-by-case basis. Claim reduction

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[23] One major reason for the genesis of joint and several liability could have been problems of service of process. Under present "long-arm" service of process statutes, such problems would rarely preclude a plaintiff from joining all of those entities it has reason to believe participated in an anticompetitive conspiracy. Occasional problems also may arise because of financial instability or bankruptcy and termination of business prior to the plaintiff filing its lawsuit. See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 275 n.2 (1979) (Blackmun, J., dissenting). However, under such circumstances a plaintiff might be permitted to recover the full amount from those against whom judgments could be obtained.

has such an effect[24] and is presently an issue in the MDL-310 litigation and other cases now pending in the lower courts. As demonstrated in certain *amici* briefs, this rule has been recognized in a number of other statutory and common law contexts.

Another device available to courts is the proper exercise of discretion pursuant to Rule 23, Federal Rules of Civil Procedure. Much of the MDL-310 *amici's* argument goes to the coercive nature of antitrust class actions. Properly used, Rule 23 can prevent the harassment of defendants and the extortion of settlements based on coercive antitrust claims. This Court has explicitly endorsed the use of Rule 23 for these purposes. Just last Term in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979), this Court directed district courts to use their broad Rule 23 powers to prevent extortion and windfall settlements:

> District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions. . . . Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class action harassment, or "windfall" settlements if the district courts exercise sound discretion and use the tools available.

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[24] The claim reduction defense discussed by several other *amici curiae* differs from and is not dependent upon contribution. Claim reduction exists in some form in all cases in which settlements have been reached with some but not all defendants in a case: a plaintiff's claim against the remaining defendants is always reduced in some amount by reason of settlements in order to prevent double recovery. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1250 (5th Cir. 1979). On the other hand, contribution would be a new cause of action created for entities found liable for antitrust violations.

Consistent with *Reiter,* several appellate and district courts have concluded that where the use of the class action device would result in potential treble damage liability for each defendant far in excess of that attributable to the activities of each defendant alone, the maintenance of a class action suit is not superior to other available methods for the fair and efficient adjudication of the controversy, as required by Rule 23(b)(3).[25] By limiting class action certification or decertifying a class once coercive conditions become apparent, a trial court can control the problems of harassment and coercion about which petitioner and MDL-310 *amici* complain.

Other mechanisms also are available to trial courts to prevent coercion, even after a suit is given class action status. Under Rule 23(e), a court is required to give its approval to all dismissals and compromises of class actions; this mechanism for the protection of absent class members also is ideally suited as a means to prevent harassment of defendants and coercion of settlements. *In re Fine Paper Antitrust Litigation, MDL-323,* Slip. Op. at 3 (E.D. Pa. Aug. 3, 1979). With such a tool, the trial court can use its powers to supervise the fairness of the settlement process in ways it deems most appropriate.

Thus, procedural tools are available to prevent the coercion and harassment of defendants in antitrust cases. They can be used to remedy the coercion problems where they in fact exist, without causing the substantial and fundamental

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[25] Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), cert. denied, 421 U.S. 963 (1975); Arth Main Street Drugs v. Beer Distributors of Indiana, Inc., 26 F.R.Serv.2d 87 (N.D. Ind. 1978); Hooley v. Red Carpet Corp. of America, Inc., 1975-1 Trade Cas. ¶ 60,285 (D. Ore. 1975), app. dismissed, 549 F.2d 643 (9th Cir. 1977); cf. Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D. Cal. 1972).

disruptions to the scheme of antitrust enforcement which a cause of action for contribution would create, and without disturbing the precedent which calls for deferring to Congress on contribution.[26]

III. ANY RULE OF CONTRIBUTION MUST EXCLUDE SETTLING DEFENDANTS

In light of the importance of settlement and the equities which favor defendants settling in good faith, judicial and statutory causes of action for contribution have specifically precluded the imposition of contribution claims against settling defendants. In antitrust cases, any decision granting contribution surely must do the same. *Beauty Supply* itself recognized the need for such a rule by stating that it "should be able to fashion a rule of contribution which will protect the rights of settling defendants," citing authorities which would deny contribution against settling defendants. 594 F.2d at 1184. Likewise, several district courts which have rejected contribution in antitrust cases have specifically concluded that contribution claims could not be imposed against settling defendants, even if allowed against nonsettling defendants and third parties. *In re Fine Paper Antitrust Litigation, M.D.L. No. 323,* Slip Op. at 3 (E.D. Pa. 1979); *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N, Slip Op. at 4-5 (N.D. Ala. June 22, 1979), *appeal docketed,* No. 79-2667 (5th Cir. July 26, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas.

[26] Antitrust defendants can also protect themselves against potentially large joint and several liability by contractually allocating the risk of liability among themselves. Such contractual arrangements, known as sharing agreements, are becoming more common in large antitrust litigation. They typically bind the participating defendants to contribute proportionately to the payment of any judgment rendered against any of them, or to remove their market share from the litigation when settlement occurs.

¶ 62,717 at 77,993 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647, 650 (D.D.C. 1979); *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979). In accordance with these authorities, this Court should at a minimum provide that no contribution claims will lie against settling defendants. Otherwise, independent settlement of multiparty antitrust cases usually would prove to be impossible.[27]

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[27] The extreme unfairness which would be imposed by permitting contribution claims against defendants which participated in joint defense efforts and settled cases in good faith prior to the creation of any new rule of contribution by this Court would almost certainly give rise to meritorious retroactivity and laches claims. Indeed, the majority of courts facing the issue have determined that new contribution rules should apply purely prospectively. See, e.g., Wesolowski v. Rhoades, 416 F.Supp. 1052, 1053 (E.D. Pa. 1976); Fraley v. Worthington, 64 F.R.D. 726, 728 (D. Wyo. 1974); United States Fidelity & Guaranty Co. v. The Park City Corp., 397 F.Supp. 411, 414 (D. Ore. 1973); Massey v. Sullivan Co., 464 S.W.2d 548, 549 (Tenn. 1971); Commercial Casualty Ins. Co. v. Leonard, 196 S.W.2d 919, 921 (Ark. 1946); Norfolk So. R. Co. v. Beskin, 125 S.E. 678 (Spec. Ct. App. Va. 1924). See also Weinberg v. Mitchell, 588 F.2d 275, 278 (9th Cir. 1978); In re Corrugated Container Antitrust Litigation, supra, 84 F.R.D. at 42.

CONCLUSION

For the foregoing reasons, Amicus Curiae Boise Cascade Corporation respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit to deny contribution in antitrust cases.

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CERTIFICATE OF SERVICE

The undersigned counsel of record for *amicus curiae* Boise Cascade Corporation hereby certifies that on January 16, 1981, three (3) copies of this Brief of Amicus Curiae Boise Cascade Corporation in Support of Respondents were placed in the United States Mail, properly addressed to counsel of record for each party separately represented herein, to wit:

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